



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

7 July 2023

Dipali Goel
Intake and Early Resolution Team
Freedom of Information Regulatory Branch
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Sir/Madam

**Freedom of Information Act Review MR22/01381 Mircea (4)
Submission**

I refer to your email of 15 June 2023 to the Federal Court of Australia (the **Court**) in which you notified the Court, pursuant to s 54Z of the *Freedom of Information Act 1982* (Cth) (the **FOI Act**), that an application has been made for the Information Commissioner to review an internal review decision of the Court dated 22 August 2022. The application to the Information Commissioner has been made on the basis that the applicant contests the Court's reasons for refusing access to the documents requested.

The decision dated 22 August 2022 (**Attachment 5**), which is the decision the subject of review by the Information Commissioner, was an internal review decision on an internal review request received on 23 July 2022 (**Attachment 4**). That decision granted access in part to the “*selection report*” requested under paragraph (a) of the request, with information redacted that is exempt from disclosure under ss 47C, 47E(c) and 47F of the FOI Act and for which it was found that disclosure would, on balance, be contrary to the public interest under s 11A(5) of the FOI Act. The decision refused access to the “*offer of employment*” requested under paragraph (b) of the request, and the “*application documents*” requested under paragraph (c) of the request, on the basis that those documents were conditionally exempt from disclosure under ss 47E(c) and 47F of the FOI Act and, on balance, disclosure would be contrary to the public interest under s 11A(5) of the FOI Act. The decision-maker determined that it would be futile under s 22 of the FOI Act to provide redacted versions of the documents requested under paragraphs (b) and (c) of the request.

The FOI applicant’s original request for access to documents was made on 27 April 2022 (**Attachment 1**). On 17 May 2022, the applicant was informed by the Court that it was appropriate to extend the period for processing their FOI request by a further period of thirty

(30) days in accordance with s 15(6) of the FOI Act, to consult third parties under s 27A of the FOI Act (**Attachment 2**). A decision was made on the applicant's request on behalf of the Court on 27 June 2022 (**Attachment 3**). The original decision granted access in part to the “*selection report*” requested under paragraph (a) of the request, with information redacted that is exempt from disclosure under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act and for which it was found that disclosure would be contrary to the public interest under s 11A(5) of the FOI Act. The original decision refused access to the “*offer of employment*” requested under paragraph (b) of the request on the basis that the document is exempt from disclosure under ss 47E(c), 47E(d) and 47F of the FOI Act, and refused access to the “*application documents*” requested under paragraph (c) of the request, on the basis that those documents are exempt from disclosure under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act and, on balance, disclosure would be contrary to the public interest under s 11A(5) of the FOI Act. The original decision-maker determined that it would be futile under s 22 of the FOI Act to provide redacted versions of the documents requested under paragraphs (b) and (c) of the request.

In your email to the Court, you requested that the Court provide a range of documents relevant to the decision under Information Commissioner review, as well as submissions in response to the applicant's contestation of the Court's reasons for refusing access to the documents requested. The documents requested by the OAIC have already been provided under separate letter.

The scope of the applicant's FOI request

1. The reason for the applicant's request for review by the Information Commissioner, provided to the Court as an attachment to your email of 15 June 2023, is that the applicant contends the Court's reasons for refusing access for two reasons. First, that the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act do not apply to the documents at issue including because the documents purportedly evidence unlawful conduct. Second, the applicant contends that the Court incorrectly applied the public interest test under s 11A(5) of the FOI Act with respect to the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act. The applicant makes this contention including on the basis that there cannot be public interest in refusing access to documents that evidence unlawful activities, and that any public interest in withholding access to that personal information in the documents at issue is minimal because at least some of that personal information is already known by the applicant or has been published online.
2. In setting out their reasons for their Information Commissioner review, the applicant refers to and relies on the reasons set out in their request for internal review dated 23 July 2022, as published on the [Right to Know](#) website. However, the hyperlink provided by the applicant is to a webpage that advises the “*Request has been removed*”. Notwithstanding, the Court has provided a copy of the internal review request as **Attachment 4**.
3. The Court rejects all of the applicant's contentions. The Court reiterates and reinforces the decision on internal review dated 22 August 2022 and the original decision dated 27 June 2022. The Court submits that the documents requested are exempt from disclosure under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act, and that the documents would retain little or no meaning if redacted versions were provided to the applicant under s 22 of the FOI Act.

4. The Court notes that the applicant has not specifically contested the application of s 22 of the FOI Act to the documents at issue. Detailed arguments will not be made within this submission about the application of that section, however, with respect to the application of that section, the Court seeks to rely on the reasoning provided in its internal review decision of 22 August 2022 and in its original FOI decision of 27 June 2022. The Court requests that, in the event that the Information Commissioner determines that the application of this section is at issue, and relies on any supporting information outside of these decisions (with the exception of the FOI Act and FOI Guidelines), the Information Commissioner provide the Court with the opportunity to make further submissions on this section and any information the Information Commissioner proposes to take into account when considering them.
5. The Court will address the applicant's first and second reasons for the present review before the Information Commissioner in turn. The Court will first address that it took all reasonable steps to find the documents requested by the applicant.

Reasonable steps to identify the documents relevant to the FOI request – s 24A(1)

6. The Court notes that the applicant has not contested the adequacy of searches undertaken to find all documents within the scope of their request, nor contends that further documents exist within the scope of their request. Notwithstanding this, the Court submits that the requirements of subsection 24A(1) have been met in that the Court took “*all reasonable steps*”¹ to find documents within the scope of the FOI request and that the Court was satisfied that four (4) documents, being the documents the subject of both the original FOI decision and internal review decision, fell within the scope of the applicant’s request.
7. The *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the **FOI Guidelines**) provide that agencies should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request, and what constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment. At a minimum, the FOI Guidelines provide that an agency or minister should take comprehensive steps to locate documents, having regard to:
 - *the subject matter of the documents*
 - *the current and past file management system and practice of destruction or removal of documents*
 - *the record management system in place*
 - *the individuals within the agency who may be able to assist with the location of documents, and*
 - *the age of the documents.*²
8. The FOI applicant’s internal review request of 23 July 2022, and their original request of 27 April 2022, sought access to the following documents:

Under the FOI Act, I would like access to:

¹ Paragraph 24A(1)(a) of the FOI Act.

² FOI Guidelines [3.89].

- a) *the selection report prepared by the selection committee that selected [name] for the position of National Registrar;*
 - b) *the offer provided to [name] in September 2018 for the National Registrar position; and*
 - c) *any and all documents constituting [name] application for the National Registrar role including his CV/resume and any responses to questions provided as part of his application.*
- 9. The documents sought pursuant to the applicant's request related to recruitment processes and a restructuring/rebadging of Registrar roles at the Court. Therefore, the existence of any documents within the scope of the applicant's request could have only been created by, or be in the possession of, the Court's People and Culture team and the Court staff who were involved in the relevant recruitment exercise.
- 10. Court staff are provided with specific training and guidance by the Court's Office of General Counsel, which is the team that handles all of the Court's FOI requests, on searching for documents pursuant to the FOI Act including what constitutes "*all reasonable steps*". Further, the Court's Office of General Counsel asks each relevant officer who undertakes searches for documents under the FOI Act to complete the search minute template provided in **Attachment 6** under cover of my separate letter, or at the very least to record their searches in a manner that addresses the level of detail in the search minute template.
- 11. On 4 May 2022, seven (7) days after the original FOI request was received, a staff member in the Court's Office of General Counsel team referred paragraph (c) of the original FOI request by email to a senior staff member in the Court's People and Culture team. Senior staff in the Court's People and Culture team are responsible for the Court's recruitment practices and have received the specific training and guidance referred to in paragraph 10 above.
- 12. On 15 May 2022, the People and Culture staff member advised the Office of General Counsel team that they found one (1) document within the scope of paragraph (c) of the applicant's request. This document was found following searches conducted of the Court's records management and information system.

Search results from prior FOI requests used for the present FOI request

- 13. Between the time when the applicant made their FOI request on 27 April 2022 and before the original decision was made on 27 June 2022, a staff member in the Court's Office of General Counsel team reviewed the documents that had been provided in response to previous FOI requests, where those requests had been made to the Court around the same time as the applicant's request and sought access to the same or similar documents. This exercise was undertaken to verify whether documents that had been found in response to other FOI requests, which were found after all reasonable steps had been taken to search for those documents, were documents that also fell within the scope of the present request before the Information Commissioner.
- 14. The search records that were completed for those prior FOI requests show that searches were conducted of the Court's human resources and recruitment inbox, personal staff emails and 'sent' folders, the human resources shared drive and other shared drives. Searches were also conducted of the Court's electronic document, records management

and information systems, RecFind and Opentext (otherwise known as Enterprise Connect).

15. Between the time when the documents found in response to previous FOI requests had been provided to the Court's Office of General Counsel team, and the time when the original FOI decision was made on 27 June 2022, the original decision-maker undertook a review of those documents. The only documents identified by the original decision-maker as falling within the scope of the applicant's FOI request were the four (4) documents which were identified in the original decision dated 27 June 2022, and were the subject of both the original FOI decision and the decision on internal review. This included the one (1) document that had already been provided in response to paragraph (c) of the applicant's request.
16. The Court submits that its searches for documents within the scope of the applicant's request were comprehensive and demonstrate that the Court took "*all reasonable steps*" to find the documents requested. Again, the Court notes that the applicant has not contested the adequacy of searches undertaken to find all documents within the scope of their request, nor contends that further documents exist within the scope of their request.

The application of ss 47C, 47E(c), 47E(d) and 47F of the FOI Act to the documents

17. The first reason for the applicant's Information Commissioner review is that the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act do not apply to the documents at issue including because the documents purportedly evidence unlawful conduct. The Court rejects the applicant's contention in full.
18. The applicant explained in their original FOI request dated 27 April 2022 that they sought access to the documents requested following "*an article published in the Australian on 8 February 2022*" entitled "*Untried lawyers score key positions*".
19. The articles referenced by the applicant in *The Australian* are two of five articles published on 8, 9 and 10 February 2022, 29 March 2022, and 24 May 2023 concerning recruitment exercises undertaken by the Court since 2016. As explained in the Court's request for confidentiality provided to the OAIC on 5 July 2023, those articles reference a confidential public interest disclosure (PID) investigation undertaken by the Australian Public Service Commissioner, specifically the then Acting Assistant Commissioner Ms Kate McMullan, and the confidential review of that investigation by the Commonwealth Ombudsman, which commenced in early 2022 and remains ongoing.
20. The apparent basis for the applicant's contention that the documents at issue evidence unlawful conduct is the applicant's conviction that the recruitment processes to which the documents relate were unlawfully conducted, and that the PID investigation into those recruitment process, which made no adverse findings against those recruitment processes, was itself unlawful.
21. In particular, in the original FOI request dated 27 April 2022, the applicant contends:

In that article the journalists note that a male "legal case manager was offered a position as national registrar in September 2018 - over other experienced solicitors - months before he completed his College of Law training course."

...

The article notes that the selection process was the subject of an investigation by acting assistant commissioner Kate McMullan of the Australian Public Service Commission. It has since come to light that Ms McMullan's investigation was an investigation under the Public Interest Disclosure Act 2013 and that the way that Ms McMullan handled her investigation is now the subject of an investigation by the Commonwealth Ombudsman under section 8 of the Ombudsman Act 1976. So serious are the allegations about the manner in which Ms McMullan handled the PID investigation that the Ombudsman has escalated the investigation of the way Ms McMullan's handled the PID investigation to a category 4 investigation (see: Spotlight shines back on watchdog, published on page 3 of the Australian on 29 March 2022 and https://www.righttoknow.org.au/request/request_for_correspondence_issue#incoming-25017).

22. In their request for internal review dated 23 July 2022, in particular, in relation to the “offer of employment” and “application documents” requested under paragraphs (b) and (c) of the request, the applicant contends:

As you know, the conditional exemptions in s 47E have no application to documents that tend to demonstrate, whether on their face, or in the light of other cogent evidence, unlawfulness. Section 47E has no application to that employment offer.

...

Consider the fact that the journalists at The Australian have noted that [name] conceded the fact that [name] had only received his law degree in the year prior to an email she sent in November 2018 (https://www.reddit.com/r/auslaw/comments/sn1a9s/untried_junior_lawyers_score_key_federal_court/). If the CV demonstrates this fact, does that not strike at the heart of [name] merits as a candidate?

23. The Court rejects that disclosure of the documents requested by the applicant would reveal unlawful activities or inefficiencies of the Court and, moreover, rejects that this would preclude the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act from applying to the documents at issue.
24. The applicant does not identify any legal materials to support their view that the Court would not be able to rely on ss 47C, 47E(c), 47E(d) or 47F of the FOI Act in circumstances that would reveal unlawful activities of the Court. Notwithstanding, the Court notes paragraph 6.123 of the FOI Guidelines, which relevantly provides in specific relation to the s 47E(d) (adverse operation of agencies) exemption:

Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

25. The Court submits that the qualification imposed by paragraph 6.123 of the FOI Guidelines is limited to s 47E(d) of the FOI Act, and does not otherwise affect the Court’s application of ss 47C, 47E(c) and 47F of the FOI Act to the documents at issue. Even if the Information Commissioner finds that the documents at issue reveal unlawful conduct (which is denied), the Court submits that the documents are still exempt from disclosure under ss 47C, 47E(c) and 47F of the FOI Act. The Court’s submissions about the alleged unlawful conduct are below.

26. The fact that there has been a disclosure made under the *Public Interest Disclosure Act 2013 (PID Act)* about the recruitment processes to which the documents at issue relate, and that there have been allegations published in the media about that recruitment process and the PID investigation, does not, in and of itself, provide evidence of unlawful conduct about those recruitment processes. Under the PID Act, disclosures can be made by any former or current public official about alleged wrongdoing. These disclosures are then formally investigated and dealt with (s 6(d) of the PID Act), with a requirement on agencies to prepare a report of the investigation including to set out any action that has been, is being, or is recommended to be taken in respect of the findings made about the PID (s 51(2)(d) of the PID Act). In other words, the question of whether there has been any wrongdoing in the federal government is subject to a statutory regime that regulates the investigation and handling of PIDs. Disclosures that are made under the PID Act, decisions to investigate those disclosures, and any information published online or by the media, are not formal determinations of guilt substantiating the alleged wrongdoing.
27. In fact, the Australian Public Service Commission (**APSC**) investigation determined that the allegations of disclosable conduct concerning the recruitment practices for the relevant SES vacancies was not substantiated. While the APSC investigation is currently under review by the Commonwealth Ombudsman, no findings have been released yet and, in that regard, the APSC's investigation stands as a valid and lawful investigation and outcome. The Court submits that the applicant's personal views about the Court's recruitment processes, their views with respect to the subsequent PID investigation into those processes, and what has been published about the Court's recruitment processes online, do not, in and of themselves, provide evidence of unlawful conduct about those recruitment processes.
28. In addition, the information published in *The Australian* has not been publicly disclosed, published or authorised by the Court, nor has the Court at any stage publicly commented as to whether what was published in the articles and online is or is not an accurate reflection of the Court's records. The decision of *Bradford v Australian Federal Police* [2021] AATA 3984 further elaborates on these circumstances, providing, at paragraph [101], the following:

The Applicant argues that certain material claimed to be exempt under s 37 of the FOI Act was already in the public domain and that this means disclosure would no longer prejudice the proper administration of the law. The Applicant has only made assertions in this regard and has not evidenced the specific disclosure of the material at issue to the public at large. Such an argument would ordinarily be raised in the context of a conditional exemption where the application of a public interest test is relevant. However, the AFP cannot control all information reported in the media and has not at any stage publicly commented as to whether the media reports referred to by the Applicant are or are not accurate reflections of the AFP's records of events. The material claimed to be exempt under s 37 of the FOI Act has not, to the extent that it is disclosed in the documents, been publicly disclosed, published or authorised by the AFP.

29. While the above decision was made in the context of section 37 of the FOI Act, the Court submits that similar reasoning would apply to the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act. Allegations in media articles are not proof of unlawful conduct, especially when such allegations are made outside the controls of the formal processes for investigating wrongdoing. The disclosure of information relating to these allegations would be contrary to the confidentiality established by the

PID Act, which operates to protect the critical deliberative process, and crucial to the operation of, agencies under that Act to hold public officials to account for the work that they do. Unfounded allegations made by members of the public or information published by the media in an attempt to circumvent that regime, lacking due process or any formal investigation, do not positively contribute to the PID regime, which demands the highest levels of confidentiality under the PID Act.

30. The Court notes that it would be inappropriate to make any further comment on the particular recruitment process the subject of the FOI request, particularly given that those processes were the subject of the confidential PID, which is currently on review before the Commonwealth Ombudsman, save to say that it is not for the applicant to determine what is and is not unlawful conduct.
31. As part of the applicant's contention that the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act do not apply to the documents at issue, the applicant identifies particular information that was redacted in the versions of the "*selection report*" already provided to the applicant in both the original FOI decision and decision on internal review, and says that this information should be released. Specifically, the applicant says in their application for Information Commissioner review:

I disagree with the exemptions applied by the internal review decision maker to the selection report document. In particular, for the reasons identified in the internal review request, there is not basis for redacting number of applications received, the number of candidates shortlisted, the name of the successful candidate... under any of the exemptions claimed (i.e. ss 47C, 47E or 47F - it is not clear which the decision maker has applied).

32. The Court rejects this contention. The Court submits that the name of the successful candidate is conditionally exempt from disclosure under s 47F of the FOI Act because it would clearly be unreasonable to disclose the name of that candidate having regard to the nature of the allegations that have been made in media articles concerning that person's recruitment and by the applicant themselves, as well as the fact that candidate's recruitment has been the subject of a confidential PID investigation which is currently under review. The Court seeks to rely on the reasons provided in the original decision dated 27 June 2022 and internal review decision dated 22 August 2022 in this regard and makes submissions about the harm that could result from disclosure of such information in the section below.
33. In relation to the number of applications received and the number of candidates shortlisted, which was information that was redacted from the versions of the "*selection report*" provided to the applicant in both the original FOI decision and on internal review, the Court submits that such information is conditionally exempt from disclosure under s 47C of the FOI Act. The Court has already explained to the applicant in both its original FOI decision and decision on internal review that the conditional exemption under s 47C of the FOI Act does not include any requirement of harm.³ The information is clearly deliberative including because it was material gathered as a basis for intended deliberations. The Court seeks to rely on the reasons provided in the original decision dated 27 June 2022 and internal review decision dated 22 August 2022 in this regard

³ See also FOI Guidelines [6.10] and [6.55].

and, in the section below, makes submissions about whether disclosure of this and other information in the “*selection report*” would be against the public interest to disclose.

34. The Court submits that, for all of the reasons above, ss 47C, 47E(c), 47E(d) and 47F of the FOI Act apply to all of the documents at issue because those documents would not, if disclosed, reveal unlawful conduct. In the alternative, the Court submits that it is only precluded from relying on the conditional exemption under s 47E(d) of the FOI Act, as that is the only conditional exemption that is subject to the qualification imposed by paragraph 6.123 of the FOI Guidelines. Therefore the documents at issue remain exempt from disclosure under ss 47C, 47E(c) and 47F of the FOI Act. In any event, the Court notes that the applicant has not contested the application of s 22 of the FOI Act to the documents at issue.

The application of the public interest test to ss 47C, 47E(c), 47E(d) and 47F of the FOI Act

35. The second reason for the applicant’s present Information Commissioner review is that the internal review decision-maker incorrectly applied the public interest test under s 11A(5) of the FOI Act with respect to ss 47C, 47E(c), 47E(d) and 47F of that Act. The applicant makes this contention including on the basis that there cannot be any public interest in withholding access to documents that evidence unlawful activities, and that any public interest in withholding access to that personal information in the documents at issue is minimal because that personal information is already said to be known by the applicant or has been published online. The Court rejects the applicant’s contentions in full.
36. Subsection 11A(5) of the FOI Act provides that an agency must give the person access to a document that is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. The Court submits that, as was the case at the time of the original FOI decision dated 27 June 2022 and decision on internal review dated 22 August 2022, giving the applicant access to the document at issue at this time would be contrary to the public interest.
37. The Court has already provided submissions above that the documents would not, if disclosed, reveal unlawful conduct. Rather, the documents were created as part of a confidential recruitment and restructuring process and contain sensitive details about the Court’s deliberations and operations during that process, as well as private information about third parties. The Court therefore submits that any public interest in disclosure of the documents at issue is minimal and outweighed by the number of factors against disclosure as set out in the internal review decision and the original FOI decision.
38. In particular, the Court accepts that disclosure of the document may increase scrutiny, discussion, comment and review of the Court’s recruitment activities, inform debate on those recruitment activities, and promote effective oversight of public expenditure. However, there are a number of factors that weigh against disclosure, and which carry with them a very real and grave risk of harm to individuals and the Court should the information in the documents be released as requested. The Court reiterates its reliance on each of the factors against disclosure, set out in the internal review decision dated 22 August 2022 and the original FOI decision dated 27 June 2022, and submits that those factors outweigh the factors favouring disclosure, such that the documents at issue are exempt from disclosure. In particular, disclosure could reasonably be expected to:

- compromise the protection of the individual's right to privacy;
- jeopardise the efficacy of the PID regime, which is essential to confidential deliberative processes and the proper operation of agencies, including the Court;
- harm the Registrar (who has not yet been named in the media but whose name appears in the documents) by linking them to the allegations and speculation in the media article;
- diminish the confidence of the public in Registrars of the Court by exposing them to the risk of further media speculation regarding the circumstances of their recruitment and the terms of their employment; and
- prejudice the ability of the Court to undertake its recruitment activities which are essential to its operations.

39. In relation to the efficacy of the PID regime, the allegations made concerning the Court's recruitment processes were already investigated by the APSC, and that investigation is presently on review before the Commonwealth Ombudsman. The disclosure of documents that relate to the allegations in a confidential PID, especially when that PID investigation remains ongoing, could substantially interfere with that investigation, damage public confidence in the PID regime, and deter public officials from making PIDs for fear that documents related to their disclosure could be publicly released. Similarly, publicity around a PID is contrary to the efficacy of the very same PID regime, which demands the highest levels of confidentiality. The Court submits that the gravity of the consequences that could follow disclosure of the documents at issue renders disclosure of the documents being against the public interest.

40. The Court submits that disclosure of documents in relation to the PID may be something of interest to the public, but disclosure is not "*in the interest of the public*" (emphasis added).⁴ As discussed above, the PID Act enforces a strict confidentiality regime that the Court is required to comply with as the agency to which the disclosure related. The PID Act does not make any exception to confidentiality in instances where a breach of a Commonwealth law has been found, nor where members of the public have disagreed with the findings in a PID. At all times the PID Act requires confidence. Any public interest in disclosure of the documents on the basis that the documents concern alleged wrongdoing is heavily outweighed by the public interest in upholding the accountability afforded by the PID regime.

41. In relation to the impact disclosure of the documents may have on the ability of the Court to undertake recruitment activities, the applicant makes the following contentions in their application for Information Commissioner review with respect to the selection report requested under paragraph (a) of their request:

While I am prepared to concede that s 47C applies to the selection committee's deliberations for selecting [name], the public interest is not in denying access to the deliberations for the reasons identified in the internal review request.

42. The Court rejects this contention. The Court submits that disclosure of the selection committee's deliberations, and any of the other information in the selection report that has not already been provided to the applicant, could impact the Court's ability to openly and frankly deliberate candidates for vacant positions. This could lead to a deterioration of the rigour applied in the recruitment of personnel, including SES personnel and the

⁴ FOI Guidelines [6.5], citing *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

Court's Registrar cohort, which are usually positions that require strategic vision and managerial responsibilities. The negative impact on the Court's recruitment, especially at the SES and Registrar level, would have a snowball effect for the operations of the Court as a whole. The applicant has also requested access to the selection report and other documents at issue at a time when those documents are the subject of media articles that have propagated information in relation to a confidential PID investigation which is currently under review. The Court submits that it is against the public interest to disclose the documents at issue in these circumstances.

43. Further, in relation to Registrars, disclosure of recruitment correspondence the subject of the present request may impact the high public standing of Registrars in the community and their ability to effectively undertake their various functions. Registrars of the Court have unique and highly-esteemed roles in the public sector. Registrars provide direct support to the Court's Judges, exercise a range of powers delegated by Judges, and perform important statutory functions assigned to them by legislation. Registrars are in the eye of the public, and have duties to the Court, practitioners, litigants and the general public. Disclosure of recruitment documentation in relation to specific Registrars of the Court, and in response to allegations such as those made by the applicant, may discourage litigants from complying with any orders or directions made by those Registrars, which could in turn compromise the role of Registrars and the enforceability of Court orders more broadly.
44. In relation to the protection of individual privacy and the potential harm to the Registrar concerned, the applicant made the following remarks in their request for internal review dated 23 July 2022:

Why have you redacted [name] name from the candidates selected? If the selection document you have provided in response to a request for "the selection report prepared by the selection committee that selected [name] for the position of National Registrar", it seems silly to redact the name of the candidate who was selected by the selection committee. The provision of a selection report prepared by the selection committee that selected [name] for the position of National Registrar entails that [name] was selected by the selection committee. It's silly to redact [name] name. Please remove the redaction over his name.

...

I accept that s 47F may have application to some parts of the application documents. It is reasonable for you to redact [name] email address, his residential address, his contact numbers, and his signatures from the application documents. Otherwise, there is no public interest in refusing access to the documents requested.

...

To be fair to [name], it is not his fault that he, a candidate who did not meet essential criteria for the role, was selected by Sia Lagos, David Pringle and Andrea Jarratt for a role he was not fit to perform. He is, of course, the beneficiary of wrongdoing, having pocketed John and Jane Taxpayer's shilling for his troubles (and at the EL1 classification, it's a plump shilling), but he did not break laws relating to merit based selection. He is, somewhat tragically, caught up in this sorry state of affairs by reason of uncritically accepting a position unlawfully offered to him.

45. Further, in their application for Information Commissioner review, the applicant states:

I disagree with the exemptions applied by the internal review decision maker to the selection report document. In particular, for the reasons identified in the internal review request, there is not basis for redacting number of applications received, the number of candidates shortlisted, the name of the successful candidate, [name], under any of the exemptions claimed (i.e. ss 47C, 47E or 47F - it is not clear which the decision maker has applied). While I am prepared to concede that s 47C applies to the selection committee's deliberations for selecting [name], the public interest is not in denying access to the deliberations for the reasons identified in the internal review request.

46. The applicant, in both their request for internal review and application for Information Commissioner review, specifically names one particular Registrar and makes allegations about their recruitment. Those communications were also published on the Right to Know website before being removed by the website operator. That name was never disclosed in the articles published in *The Australian*. That name also appears in the documents at issue which, if released, would identify that Registrar, linking them to the allegations that have been made in the articles published in *The Australian* and on the Right to Know website.
47. It is evident that the applicant, in their publication of the Registrar's name on the Right to Know website alongside allegations regarding the integrity of their recruitment, has proactively sought to compromise the privacy of individuals like that Registrar. The applicant also seeks access to a range of other personal information about that particular Registrar in the documents at issue, including the Registrar's employment history, qualifications, skills and attributes, salary, and terms and conditions of employment. The Court submits that there is greater public interest in protecting individual privacy in these circumstances.
48. The Court submits that the impact of the publication of allegations concerning the recruitment of particular individuals, which has sometimes been paired together with publication of their confidential employment documents, have already had very real and serious effects on the mental health and wellbeing of numerous employees of the Court. Registrars of the Court have communicated serious concerns in relation to the detrimental effects the articles published in *The Australian* and the allegations on the Right to Know website have had, and continue to have, on their mental health and wellbeing. Much of that communication has been in response to consultation with those individuals under s 27A of the FOI Act in relation to some of the one hundred and eight (108) FOI requests (not including internal review requests) made to date through the Right to Know website and other anonymous means following the publication of articles in *The Australian*.
49. The Court submits that it is clear that disclosure of the personal information in the documents requested would contribute to the compromised privacy of these individuals and will likely cause them further stress and anxiety. Given the detrimental effects that have already been incurred, the Court submits that disclosure of the personal information in the documents requested is very likely to lead to the further reduction of staff morale and productivity and, potentially, issues with staff retention.
50. The Information Commissioner review form asks the question that, if the applicant is seeking review of the personal privacy exemption (s 47F), whether they "*have consent of the third party/ies whose information you seek*". The Court notes that the applicant has not indicated on the review form whether they have consent of the third parties whose information they seek. The Court submits that disclosure of documents requested would

unequivocally compromise the privacy of the particular Registrar in question, especially having regard to the fact that it is doubtful the applicant has obtained the consent of that Registrar whose information they seek, and that the applicant may publish any documents that are disclosed to them to the world at large, given their FOI was made publicly through the Right to Know website before being removed by the website operator.

51. To the extent that any of the contents of the documents at issue may have already been published by *The Australian* or released by agencies other than the Court in response to FOI requests made to those agencies, the Court submits that this does not preclude the Information Commissioner from finding that the documents captured by the applicant's request are unreasonable to disclose. Relevantly, the decision of *Re Jones and Commissioner of Taxation* [2008] AATA 834 provides, at paragraph [11], as follows:

When considering whether it is reasonable or not to disclose personal information, I regard the fact that the information may be available from other sources as merely a matter to be taken into account. For example that the will of the Applicant's deceased father was admitted to probate and hence might be the subject of a search at the Supreme Court registry does not of itself make the release of that document reasonable in these proceedings.

52. The Court reiterates its reliance on each of the factors against disclosure, set out in the internal review decision dated 22 August 2022 and the original FOI decision dated 27 June 2022, and submits that those factors outweigh the factors favouring disclosure, such that the documents at issue are exempt from disclosure under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act. The Court notes that the applicant has not specifically contested the application of s 22 of the FOI Act to the documents at issue, in that it would be futile to provide redacted versions of the documents to the applicant.
53. If you have any queries in respect of these submissions, or require any additional information, please do not hesitate to contact the Court.

Yours sincerely



Scott Tredwell
General Counsel